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No. 74-114

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As an alternate ground for affirming the judgment of the court of appeals, respondent argues (Br. 46-55) that the stop of his vehicle by Border Patrol agents was invidiously discriminatory in violation of the due process clause of the Fifth Amendment and that he is therefore entitled either to "suppression of the resultant evidence or dismissal of the criminal charges" against him (Br. 47).[1]

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[1]Insofar as respondent argues that the charges against him should be dismissed, the issue is not properly presented in this Court. The court of appeals held that the evidence derived from the stop of respondent's automobile should not have been admitted (A. 17), and it reversed and remanded the case in light of that holding (A. 18). The court's judgment did not direct that the charges against respondent be dismissed. Since respondent filed no cross-petition for a writ of certiorari, he may not now seek a modification of the judgment under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Respondent does not attack any legislative classification. Nor, for purposes of this argument, does he dispute the authority of Border Patrol officers, consistent with the Fourth Amendment, "to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) and (3)" (Br. 49). His claim, rather, is that the authority conferred by that Section "cannot be used to discriminate against persons appearing of Mexican descent" (*ibid.*). "[I]t would be invidious discrimination," he says, "if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right to travel of those who appeared to be of Anglo-Saxon background" (Br. 54).

Respondent's contentions are wholly hypothetical, for there is not a shred of evidence in this record or in the record in *United States* v. *Ortiz,* No. 73-2050, to support a claim that Border Patrol officers "stop only those who appear to be of Mexican ancestry" or that they use their statutory authority "to discriminate against persons appearing of Mexican descent." As we show in our reply brief in *Ortiz,* the record there demonstrates that the national origin characteristics of a vehicle's occupants are not the basis upon which officers determine whether the vehicle should be stopped for purposes of inquiry. The characteristic appearance of Mexican *residents* is what the officers look for.

Respondent appears to rest his charge of invidiously discriminatory practices by the Border Patrol solely upon an agent's single affirmative response to defense counsel's questions on cross-examination in this case (A. 8-9):

> Q: Agent Brady, what was the reason you stopped the car?
>
> A: Routine immigration inspection.

> Q: You said there was nothing unusual about it, other than it was traveling north, is that correct?
>
> A: That's true.
>
> * * * *
>
> Q: Could you see the occupants of the car from your position on the roadway?
>
> A: Yes, sir.
>
> * * * *
>
> Q: Did these people inside the car appear to be of Mexican descent to you?
>
> A: Yes, sir.
>
> Q: And that, if there was any, appeared to be the reason you stopped them?
>
> A: Yes, sir.

There is nothing in the record to suggest that it was the agent's practice to stop all cars containing persons who appeared to be of Mexican descent or to stop only such cars. All that can be said is that the agent determined to stop *this* car to inquire as to the citizenship of the three occupants who appeared to be of Mexican descent.

The reasonableness of the agent's action should be viewed in light of the surrounding circumstances. As we showed in our opening brief (pp. 20-21, 30-31), Border Patrol Agents Brady and Harkins were observing traffic during the early evening hours on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where more than 12,000 deportable aliens were apprehended in fiscal year 1973. Their patrol car was at a 90-degree angle to the highway, and their headlights were on. It is understandable, in those circumstances, that

a northbound vehicle carrying three persons of apparent Mexican descent might arouse the suspicions of the agents. Those suspicions in this case were borne out, for the agents discovered after stopping the car that the two passengers were illegal entrants and that the driver, respondent, was engaged in unlawfully transporting those aliens knowing them to be in this country illegally.

The officers' actions were not invidiously discriminatory. It is because racial or ethnic characteristics are in most circumstances irrelevant that discrimination on the basis of such characteristics is forbidden. *Hirabayashi* v. *United States,* 320 U.S. 81, 100. But we are dealing here with an immigration law enforcement problem of immense proportions, and nearly all the violators in the Mexican border area are illegal entrants from Mexico. Since the class of violators is composed of persons who are likely to appear to be of Mexican descent, it is not impermissible for law enforcement officers to take that fact into account in determining which persons should be asked about their citizenship. The situation here is analogous to that in which law enforcement officers are given descriptions of robbery suspects that include the suspects' race. Surely it would not be impermissible for the officers to limit their investigation to persons who fit the descriptions. Similarly, "common sense [dictates] that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status." *Hon Keung Kung* v. *District Director,* 356 F. Supp. 571, 575 (E.D. Mo); see also *United States* v. *Saldana,* 453 F.2d 352, 354 (C.A. 10).

Respectfully submitted.

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